

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Respondent,

No. 2:02-cr-0416-GEB-JFM

vs.

DAWANE A. MALLETT,

Movant.

FINDINGS AND RECOMMENDATIONS

_____/

Movant is a federal prisoner proceeding pro se with a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. In 2003, movant was convicted of two counts of aiding and abetting interference with commerce by robbery, in violation of 18 U.S.C. § 1951(a)(2); two counts of use of a firearm, in violation of 18 U.S.C. § 924(c); one count of aiding and abetting armed bank burglary and kidnapping, in violation of 18 U.S.C. § 2113(a),(d) and (e); and one count of aiding and abetting carjacking a vehicle that has been transported in interstate commerce, in violation of 18 U.S.C. § 2119. On February 6, 2004, movant was sentenced to 654 months in federal prison.¹ In the instant motion, movant raises sixteen claims for relief from the conviction and sentence. Respondent contends that some of movant's claims

¹ Movant was also assessed a penalty of \$600 and ordered to pay restitution in the amount of \$1,844.83. See Judgment filed February 13, 2004.

1 are not cognizable on collateral review, that some of the claims are procedurally barred by
2 movant's failure to raise them on direct appeal, and that none have merit.

3 FACTUAL BACKGROUND

4 Movant's convictions arose from four events: an attempted robbery of a Money
5 Mart Store in Sacramento, California on March 20, 2002; an attempted robbery of a California
6 Check Cashing business in Sacramento, California on May 30, 2002; carjacking, kidnapping of
7 Alicia Montoya and an associated armed bank burglary on June 6 and 7, 2002; and wire fraud
8 perpetrated on June 7, 2002. Movant was tried with a co-defendant, Terrance Mallett. Each had
9 their own counsel at trial.

10 LEGAL STANDARDS

11 Section 2255 provides that

12 [a] prisoner in custody under sentence of a court established by Act
13 of Congress claiming the right to be released upon the ground that
14 the sentence was imposed in violation of the Constitution or laws
15 of the United States, or that the court was without jurisdiction to
16 impose such sentence, or that the sentence was in excess of the
maximum authorized by law, or is otherwise subject to collateral
attack, may move the court which imposed the sentence to vacate,
set aside or correct the sentence.

17 28 U.S.C. § 2255.

18 Ordinarily, a defendant may not raise a claim for the first time in a § 2255 motion.
19 United States v. Frady, 456 U.S. 152, 167 (1982) (claim not raised on direct appeal is barred);
20 United States v. Johnson, 988 F.2d 941, 945 (9th Cir.1993) ("If a criminal defendant could have
21 raised a claim of error on direct appeal but nonetheless failed to do so, he must demonstrate both
22 cause excusing his procedural default, and actual prejudice resulting from the claimed error.").
23 "'Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the
24 claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and
25 actual 'prejudice,' or that he is 'actually innocent.'" " U.S. v. Ratigan, 351 U.S. 957, 964 (9th
26 Cir. 2003 (quoting Bousley v. United States, 523 U.S. 614, 622 (1998) (internal citations

omitted)). “Constitutionally ineffective assistance counsel constitutes cause sufficient to excuse a procedural default.” Ratigan, at 964-65 (citing Murray v. Carrier, 477 U.S. 478, 488 (1986)). However, “the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default.” Murray v. Carrier, 477 U.S. at 486.

MOVANT’S CLAIMS

I. Ineffective Assistance of Counsel

Movant raises two claims of ineffective assistance of counsel. In his first claim, he contends that his defense counsel was ineffective in (1) failing to cross examine Alicia Montoya; (2) refusing to allow movant to testify in his own defense; and (3) withdrawing movant’s plea of not guilty by reason of insanity. In his fourth claim for relief, movant contends that his appellate counsel was ineffective in (1) failing to raise on direct appeal all of the claims raised in the instant motion; (2) failing to communicate with movant before filing a direct appeal; (3) failing to keep movant apprised of the status of his appeal; and (4) placing a collect call block on his telephone after being appointed to represent movant on direct appeal.

In order to prevail on his claims of ineffective assistance of counsel, movant must show two things, an unreasonable error and prejudice flowing from that error. First movant must show that, considering all the circumstances, counsel’s performance fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 688 (1984). The court must determine whether in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance. Id. at 690. “Review of counsel’s performance is highly deferential and there is a strong presumption that counsel’s conduct fell within the wide range of reasonable representation.” United States v. Ferreira-Alameda, 815 F.2d 1251 (9th Cir. 1986).

Second, movant must prove prejudice. Strickland at 693. To demonstrate prejudice, petitioner must show that “there is a reasonable probability that, but for counsel’s

unprofessional errors, the result of the proceeding would have been different.” Id. at 694. A reasonable probability is “a probability sufficient to undermine confidence in the outcome.” Id. The focus of the prejudice analysis is on “whether counsel’s deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.” Lockhart v. Fretwell, 506 U.S. 364, 372 (1993). “A court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” Strickland, at 697.

The court turns first to movant’s claim of ineffective assistance of trial counsel, which, as noted above, contains three separate contentions. With respect to the first, the record shows that neither movant’s counsel nor his co-defendant’s counsel cross-examined Ms. Montoya. See Reporter’s Transcript (RT) at 390:24-391:1. Movant has made no showing of any cognizable prejudice as a result of his counsel’s decision not to cross-examine Ms. Montoya, nor does it appear from the record that movant was so prejudiced.

With respect to the second contention, the record does not support movant’s assertion that counsel refused to allow him to testify. At a bench conference following the conclusion of the government’s case-in-chief, movant’s counsel advised the court that he had “just confirmed with [movant] that he does not wish to testify. RT at 672:22-23. Subsequently, in open court in front of the jury movant’s counsel represented that his defense rested “on the state of the evidence” and movant made no attempt to indicate that he wished to testify. RT at 684:11. Moreover, movant has made no showing of prejudice from his failure to testify.

Finally, as noted above, movant contends that his trial counsel rendered ineffective assistance by withdrawing a plea of not guilty by reason of insanity. In fact, the record shows that prior to appointment of his trial counsel, movant filed notice pursuant to Fed. R. Crim. P. 12.2 of intent to rely on an insanity defense. See, e.g., Docket No. 203. Subsequently, the trial court revoked movant’s right to represent himself and appointed trial counsel, who had previously been serving as stand-by counsel, to represent petitioner. See Order

1 filed October 24, 2003. Thereafter, counsel did not pursue an insanity defense. Movant has
2 presented no evidence to show that he suffered cognizable prejudice as a result of this decision.

3 For all of the foregoing reasons, movant's claim of ineffective assistance of trial
4 counsel should be denied.

5 Movant's claim of ineffective assistance of appellate counsel is based on four
6 contentions: the failure of appellate counsel to raise on direct appeal all of the claims raised in
7 the instant motion; the alleged failure of appellate counsel to communicate with movant before
8 filing a direct appeal; the alleged failure of appellate counsel to keep movant apprised of the
9 status of his appeal; and the alleged action of appellate counsel in placing a collect call block on
10 his telephone after being appointed to represent movant on direct appeal.

11 With respect to the latter contention, respondent has presented evidence from
12 movant's appellate counsel that his "general policy is to accept collect calls from incarcerated
13 clients" and that he "did not put a collect call block on his telephone while he was representing"
14 movant, Declaration of Victor S. Haltom, Esq., filed July 17, 2009 (Haltom Declaration), at ¶ 5.
15 Mr. Haltom also avers that he spoke with movant on the telephone during the course of the
16 representation, and that he has "over the years . . . been told by some clients that they attempted
17 to make collect calls to [his] office telephone but the calls did not go through." *Id.* at ¶¶ 4, 6. In
18 response, movant has filed an affidavit in which he avers only that Mr. Haltom refused "to
19 communicate with [movant] before filing [his] direct appeal." Affidavit of Dawane Arthur
20 Mallett, filed September 13, 2010 (Mallett Affidavit), at 2. This affidavit is insufficient to rebut
21 the evidence filed by respondent. This court finds no evidence to support movant's assertion that
22 his appellate counsel blocked collect calls from movant during the course of representation.

23 Movant's contention that his counsel was ineffective in failing to raise all the
24 claims raised in the instant motion would require a showing that the outcome of his appeal would
25 have been different had those claims been raised. For the reasons set forth infra, movant's claims
26 are without merit. He cannot, therefore, make the required showing of prejudice.

Finally, movant makes two contentions concerning alleged failures of his appellate counsel to communicate with him, both before filing the appeal and during the pendency of the appeal. Movant's appellate counsel has averred that he visited with movant in the Sacramento County Jail before movant was transferred to federal prison, that he communicated with him in writing thereafter, that he provided movant with copies of the appellate briefs, and that he spoke with movant on the telephone while the appeal was pending. Haltom Declaration, at ¶¶2-4. Movant's declaration is insufficient to rebut this evidence. See Mallett Affidavit at 2. Moreover, even assuming arguendo that these allegations were supported by evidence in the record, movant has not shown any cognizable prejudice from any alleged failure by his appellate counsel to communicate with movant.

For all of the foregoing reasons, movant's claim of ineffective assistance of appellate counsel should be denied.

II. Movant's Remaining Claims

_____ Movant raises fourteen claims in addition to the foregoing two claims of ineffective assistance of counsel. Respondent contends that the remaining claims are barred by the doctrine of procedural default because the claims should have been, but were not, raised on direct appeal, that claims five, ten, and sixteen are not cognizable on collateral review, and that none of these claims have merit.

A. Claims Five, Ten and Sixteen

1. Claim Five – Violation of Sixth Amendment Right to Speedy Trial

_____ In Claim Five, movant claims that he "demanded a speedy trial at every court appearance, but was denied," in violation of his Sixth Amendment right to a speedy trial. Respondent contends that a claimed violation of the Speedy Trial Act is not cognizable on this § 2255 motion, but movant relies on the federal constitution rather than the federal statute on the

"The Sixth Amendment guarantees that in all criminal prosecutions the accused shall enjoy the right to a speedy trial." Doggett v. United States, 505 U.S. 647, ----, 112 S.Ct. 2686, 2690, 120

L.Ed.2d 520 (1992). Speedy trial challenges are subject to a four part inquiry governed by Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1971). The four factors are: “(1) whether delay before trial was uncommonly long, (2) whether the government or the criminal defendant is more to blame for that delay, (3) whether, in due course, the defendant asserted his right to a speedy trial, and (4) whether he suffered prejudice” because of the delay. Doggett, 505 U.S. at ----, 112 S.Ct. at 2690; United States v. Turner, 926 F.2d 883, 889 (9th Cir.), cert. denied, 502 U.S. 830, 112 S.Ct. 103, 116 L.Ed.2d 73 (1991).

Doggett breaks the first inquiry, length of delay, into two steps. 505 U.S. at ----, 112 S.Ct. at 2690. To trigger a speedy trial inquiry, an accused must show that the period between indictment and trial passes a threshold point of “presumptively prejudicial” delay. Id. If this threshold is not met, the court does not proceed with the Barker factors. Id. If, however, the threshold showing is made, the court considers the extent to which the delay exceeds the threshold point in light of the degree of diligence by the government and acquiescence by the defendant to determine whether sufficient prejudice exists to warrant relief. Id. 505 U.S. at ----, 112 S.Ct. at 2690, 2693-94.

If the length of the delay has not passed a threshold point of presumptive prejudice—at least one year—the court need not consider the other three factors. United States v. Beamon, 992 F.2d 1009, 1012 (9th Cir.1993) (citing Doggett v. United States, 112 S.Ct. 2686, 2690 (1992)). If, however, the threshold showing is made, the court considers the extent to which the delay exceeds the threshold point in light of the degree of diligence by the government and acquiescence by the defendant to determine whether sufficient prejudice exists to warrant relief. Id. 505 U.S. at ----, 112 S.Ct. at 2690, 2693-94.

U.S. v. Beamon, 992 F.2d 1009, 1012 (9th Cir. 1993)

The original criminal complaint was filed against movant on September 6, 2002 and a warrant for movant’s arrest was issued on the same day. Movant made his initial appearance before a United States Magistrate Judge on September 10, 2002 and was ordered detained. On September 19, 2002, an indictment was filed. Movant was arraigned on September 24, 2002 and entered a not guilty plea. A second superseding indictment was filed on July 30, 2003. Trial commenced on October 28, 2003.

More than one year elapsed between the filing of the original criminal complaint, as well as the indictment, and the start of jury trial. Specifically, the one year threshold was

1 exceeded by 52 days. Movant acquiesced in the exclusion of well over 52 days of time between
 2 September 6, 2002 and October 28, 2003. See, e.g., Docket # 10 (8 days); Docket # 12 (24
 3 days); Docket # 12 (8 days); Docket # 24 (120 days); Docket # 38 (35 days). Movant's Sixth
 4 Amendment right to a speedy trial was not violated in the underlying criminal proceedings. This
 5 claim should be denied.

6 2. Claim Ten

7 In his tenth claim for relief, movant alleges violation of his rights under the Fourth
 8 and Fifth Amendments as well as the Omnibus Crime Control and Safe Streets Act. Movant
 9 contends that he used a telephone in a jail holding cell and was not informed that the calls were
 10 being recorded. He claims that the court erred in not suppressing recordings of the tapped
 11 telephone calls. Respondent contends that this claim is not cognizable on this § 2255 motion
 12 because movant had a full and fair opportunity to litigate the claim at trial.

13 Movant's claim arises, if at all, under the Fourth Amendment.² Movant is not
 14 entitled to relief on a Fourth Amendment claim where he had a full and fair opportunity to
 15 litigate his Fourth Amendment claim at the time of the underlying trial. See Tisnado v. U.S., 547
 16 F.2d 452, 456 (9th Cir. 1976) (citing Stone v. Powell, 428 U.S. 465, 481 & n.16 (1976)). Movant
 17 has made no showing that he did not have that opportunity at trial. This claim should be denied.

18 3. Claim Sixteen

19 In his sixteenth claim for relief, movant challenges the computation of his
 20 sentence under the Federal Sentencing Guidelines. Movant contends that he was improperly
 21 given two points for an escape conviction that he suffered as a juvenile and two points for being
 22 arrested for his current offense less than two years "from last offense." Section 2255 Motion,
 23

24 ² Movant has made no showing that the recording of jail telephone calls between movant
 25 and his co-defendant violated the Omnibus Crime Control and Safe Streets Act of 1968. The
 26 statute, by its terms, exempts from its coverage "oral communications . . . intercepted by
 investigative and law enforcement officers acting in the ordinary course of their duties." U.S. v.
Van Poyck, 77 F.3d 285, 292 (9th Cir. 1996) (citing 18 U.S.C. § 2510(5)(a)).

Attachment at 6. Movant apparently contends that this was improper because all four points were derived from the same conduct. See id. Movant contends that this caused him to be improperly placed in Criminal History Category III for sentencing purposes, rather than Criminal History Category I.

At the outset, the court notes that “nonconstitutional sentencing errors that have not been raised on direct appeal have been waived and generally may not be reviewed by way of 28 U.S.C. § 2255.” U.S. v. Schlesinger, 49 F.3d 483, 485 (9th Cir. 1994).³ Even assuming arguendo that the merits of this claim are tendered through movant’s ineffective assistance of appellate counsel claim, the claim should be denied.

The Federal Sentencing Guidelines contain instructions for computing a defendant’s criminal history. See United States Sentencing Guidelines, Chapter Four, Part A. Pursuant to those guidelines, a defendant receives two points “for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of” the offense for which he is to be sentenced. U.S.S.G. § 4A1.2(d)(2)(A). The sentencing guidelines also provide for addition of points for prior prison terms. U.S.S.G. § 4A1.1. At the time movant was sentenced, the guidelines also required an addition of two points if the defendant committed the current offense “less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence.” Former U.S.S.G. § 4A1.1(e) (removed by 2010 Amendments).

“Double counting” occurs when the Guidelines use the same conduct more than once to increase the severity of a sentence. Double counting is permissible if it accounts for more than one type of harm caused by the defendant’s conduct, or where each enhancement of the defendant’s sentence

³ Although movant claims this violated his Fifth Amendment right to due process, respondent correctly argues that the claim is in fact a claim of error in the application of the Federal Sentencing Guidelines.

1 serves a unique purpose under the guidelines. See
2 United States v. Calozza, 125 F.3d 687, 691 (9th
3 Cir.1997); United States v. Reese, 2 F.3d 870, 895
(9th Cir.1993), cert. denied, 510 U.S. 1094, 114
S.Ct. 928, 127 L.Ed.2d 220 (1994).

4 U.S. v. Parker, 136 F.3d 653, 654-55 (9th Cir. 1998). The fact that movant served a prior prison
5 sentence is different from the proximity between the conclusion of that sentence and his present
6 offense. The computation of his criminal history score challenged by movant was not erroneous.
7 This claim should be denied.

8 B. Claims Two, Three, Six, Seven, Eight, Nine, Eleven, Twelve, Thirteen, Fourteen and
9 Fifteen

10 1. Sufficiency of the Evidence

11 Six of movant's remaining claims are styled claims of insufficient evidence/actual
12 innocence. See Grounds 2, 3, 12, 13, 14 and 15 of § 2255 Motion, filed April 3, 2008. In those
13 claims, movant contends there was insufficient evidence to support his conviction on charges of
14 use of a firearm during a crime of violence, interference with commerce with respect to the
15 robbery of Money Mark or the Check Cashing business, armed bank burglary and kidnapping, or
16 carjacking. Ground 2 also includes an assertion that his prosecution for use of a firearm during a
17 crime of violence violated his rights under the Double Jeopardy Clause because he had already
18 served time in state prison for the same offense.

19 When a challenge is brought alleging insufficient evidence, federal habeas corpus
20 relief is available if it is found that upon the record evidence adduced at trial, viewed in the light
21 more favorable to the prosecution, no rational trier of fact could have found proof of guilt beyond
22 a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). Under Jackson, the court
23 must review the entire record when the sufficiency of the evidence is challenged on habeas.
24 Adamson v. Ricketts, 758 F.2d 441, 448 n.11 (9th Cir. 1985), vacated on other grounds, 789 F.2d
25 722 (9th Cir. 1986) (en banc), rev'd, 483 U.S. 1 (1987). It is the province of the jury to 'resolve
26 conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic

facts to ultimate facts.” Jackson, 443 U.S. 307, 319. “The question is not whether we are personally convinced beyond a reasonable doubt. It is whether rational jurors could reach the conclusion that these jurors reached.” Roehler v. Borg, 945 F.2d 303, 306 (9th Cir. 1991).

a. Sufficiency of the Evidence to Support Convictions from Attempted Robbery of Money Mart

In grounds two and twelve of the petition movant challenges the sufficiency of the evidence to support his conviction on charges of aiding and abetting robbery in violation of 18 U.S.C. § 1951 and carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1), charged in counts 1 and 2 of the second superseding indictment. A violation of 18 U.S.C. § 1951, so called Hobbs Act robbery, has two elements: “(1) that the defendant either committed or attempted to commit a robbery, and (2) a nexus between the defendant’s acts and interstate commerce. 18 U.S.C. § 1951(a); Stirone v. United States, 361 U.S. 212, 218, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960).” U.S. v. Woodruff, 122 F.3d 1185 (9th Cir. 1997). A violation of 18 U.S.C. § 924(c) has three elements: (a) commission of a crime of violence; (b) knowingly carrying or using a firearm; and (c) carrying or using the firearm during and in relation to the crime or possessing the gun to further the crime. See 18 U.S.C. § 924(c)(1)(A). Counts 1 and 2 were based on charges arising from the attempted robbery at the Money Mart store.

With respect to count 1, movant contends that he did not interfere with commerce, that he neither robbed nor attempted to rob the Money Mart, and that he “did time for this same offense.” With respect to count 2, movant contends that (1) he “did time in state court for the same offense”; and (2) he did not use a firearm during a crime of violence, e.g., robbery. Section 2255 Motion at 4.

Movant has presented no evidence in support of his contention that his right to protection from double jeopardy was violated by his conviction on count 1 or count 2 because he “did time” for the same offense. Specifically, movant has presented no evidence of any state charges or conviction arising from that attempted robbery. Moreover, it is well settled that “a

1 federal prosecution may follow a state prosecution for the same acts.” U.S. v. Enas, 255 F.3d
 2 662, 666 (9th Cir. 2001) (citing United States v. Lanza, 260 U.S. 377, 382 (1922)).

3 At trial, a Sacramento police officer gave the following testimony relevant to
 4 disposition of the claim at bar. Movant was found in the ceiling at the Money Mart store after
 5 the officer responded to a burglary alarm. RT at 177:17-179:14. Movant was wearing a blue
 6 coat, pink gloves, and a ski cap with eyeholes cut in it. Id. at 180:12-181:15. The ski cap was on
 7 the top of movant’s head and his face was exposed. Id. at 181:18-22. While movant was
 8 lowering himself from the ceiling, the officer “noticed the butt of a gun hanging from his jacket.”
 9 Id. at 180:12-16. A second police officer who responded to the Money Mart alarm testified that
 10 he saw “the handle of a gun sticking out of the left pocket of this jacket” and that he retrieved the
 11 gun, a .38 caliber revolver, from movant’s jacket. RT at 197:15-205:24. A third officer testified
 12 on cross-examination that he had no information that anything had been taken from the Money
 13 Mart. RT at 222:12-14.

14 The testimony that movant was discovered waiting in the ceiling area of the
 15 Money Mart wearing a ski cap that had eyeholes cut into it and armed with a gun could support
 16 an inference that movant was waiting to commit a robbery by threat of force or violence, in
 17 violation of 18 U.S.C. § 1951(a), which qualifies as a crime of violence within the meaning of
 18 18 U.S.C. § 924(c)(1), as well as an inference that movant was knowingly carrying the firearm
 19 and that he was in possession of the gun to further the planned robbery. The evidence was
 20 sufficient to support movant’s conviction on counts 1 and 2 and movant’s appellate counsel was
 21 not ineffective for failing to challenge those convictions on the ground of insufficient evidence.
 22 Movant has not shown cause and prejudice for the failure to raise these claims on direct appeal.

23 b. Sufficiency of the Evidence to Support Convictions from Attempted
 24 Robbery of California Check Cashing

25 In grounds three and thirteen of the petition movant challenges the sufficiency of
 26 the evidence to support his conviction on charges of aiding and abetting robbery in violation of

1 18 U.S.C. § 1951 and carrying a firearm during a crime of violence in violation of 18 U.S.C. §
 2 924(c)(1), charged in counts 3 and 4 of the second superseding indictment. Those counts arose
 3 from events at the California Check Cashing business.

4 With respect to count 3, movant contends that he did not interfere with commerce,
 5 that he neither robbed nor attempted to rob the California Check Cashing business. With respect
 6 to count 4, movant contends that the gun offered in evidence was found ten days after movant
 7 was arrested and had no fingerprints on it.

8 At trial, the following testimony relevant to disposition of the claim at bar was
 9 offered. Sacramento County Sheriff's Deputy Rudolfo Roque identified movant as one of the
 10 subjects arrested at the scene of the break-in at the California Check Cashing business. RT at
 11 340:18-343:9.⁴ The branch manager of the California Check Cashing business testified that he
 12 was working on the day of the attempted robbery. RT at 226:25-227:4. After the break-in, he
 13 did not empty the trash in his office for about a week. Id. at 242:24-243:4, 248:15-20. When he
 14 did lift his wastebasket to empty it "felt rather heavy for a wastebasket" that he "assumed" just
 15 contained "calculator tape and fast food trash." Id. at 243:8-11. He took the wastebasket to
 16 empty it into a larger trash can, pushed some of the paper aside, and found a drawstring bag that
 17 contained a roll of duct tape and a gun partially wrapped in a knit cap. Id. at 243:20-244:18. He
 18 immediately called 911 and gave the items to the deputies who responded to the call. Id. at
 19 248:24-249:6. In addition, the government offered a transcript of a recorded conversation
 20 between movant and his co-defendant from which a reasonable inference could be drawn that
 21 movant told his co-defendant that he had put the gun in the wastebasket. See RT at 693:11-21
 22

23 ⁴ The testimony concerning the circumstances of movant's arrest and that of his co-
 24 defendant is somewhat confusing. The testimony of Sacramento County Sheriff's Deputy Wayne
 25 Stephens implies that movant's co-defendant was arrested inside the California Check Cashing
 26 business, but other testimony implies that movant's co-defendant was seen in a field adjacent to
 the business using a walkie-talkie and that movant was arrested inside the building. For purposes
 of this motion, it is sufficient that there was testimony that movant was taken into custody in the
 building as one of the perpetrators.

(during closing argument, slide 7 containing transcription of conversation distinguishing between “walkie talkie” and “shit”; movant affirming that the two were different and that “[i]f the junk get dumped” the “shit will be gone.”).

The foregoing evidence is sufficient to support an inference that movant was armed at the time of the attempted robbery of the California Check Cashing business. The evidence was sufficient to support movant’s conviction on counts 3 and 4 and movant’s appellate counsel was not ineffective for failing to challenge those convictions on the ground of insufficient evidence. Movant has not shown cause and prejudice for the failure to raise these claims on direct appeal.

c. Sufficiency of Evidence to Support Armed Bank Burglary and Kidnapping

In his fourteenth and fifteenth claims for relief, movant contends that his convictions for armed bank burglary and carjacking were not supported by sufficient evidence because no weapon was ever shown to the jury or admitted into evidence. At trial the victim testified that a knife was used in the commission of the offense. See, e.g., RT at 370:16-371:10, 371:12-24. That testimony is sufficient to support this conviction. Movant’s appellate counsel was not ineffective for failing to challenge those convictions on the ground of insufficient evidence, and movant has not shown cause and prejudice for the failure to raise these claims on direct appeal.

2. Claim Six

Movant’s sixth claim for relief is that his Fifth Amendment right to due process was violated because he was incompetent to stand trial. Movant claims that he was sent to the Federal Medical Center at Butner (Butner) for a competency evaluation but no evaluation took place. Movant further claims that he was placed on suicide watch while he was at Butner but that was omitted from the report to the court, and that the results of his competency test were also withheld from the court.

1 Movant's claim is without factual foundation. The record reflects that movant did
2 receive a competency evaluation, that a report of that evaluation was provided to the court, and
3 that the report did include information about movant's placement on suicide watch. See Order
4 filed April 14, 2003; Forensic Evaluation dated April 1, 2003, a copy of which is appended to
5 Docket # 66, at 6. Movant's appellate attorney was not ineffective for failing to raise this claim
6 on direct appeal, and movant has established neither cause nor prejudice for the procedural
7 default of this claim.

8 3. Claims Seven and Eight

9 Movant's seventh and eight claims for relief arise from an outburst by defendant
10 during trial. Movant alleges that he threatened to kill the jury during the outburst and had a
11 mental breakdown. He further alleges that he was tackled by U.S. Marshals in the presence of
12 the jury, removed from the courtroom, and denied all means to communicate with his lawyer. He
13 alleges that these events and the court's denial of his subsequent motion for mistrial violated his
14 Fifth Amendment right to due process.

15 Prior to trial, movant engaged in conduct that led to his exclusion from the
16 courtroom and a finding of criminal contempt by the trial court. RT, October 27, 2003, at 31:2-
17 32:4. Movant was returned to court the next day for the start of trial and allowed to remain on
18 his assurance to the court that he would conduct himself in accordance with court decorum. RT
19 at 1:23-2:9. The court advised movant that arrangements had been made for any defendant
20 removed from the courtroom to be provided with audio and video feed of the trial proceedings,
21 but that no telephone would be installed in the cell. Id. at 2:23-3:11. Movant remained in the
22 courtroom throughout the course of trial. During the prosecution's closing argument, movant
23 interrupted and the following exchange took place:

24 DEFENDANT D. MALLETT: He's lying. Shut your white ass
25 up.

26 THE COURT: Just a moment.

1 DEFENDANT D. MALLETT: Fuck the jury and all y'all white
2 mother fuckers.

3 THE COURT: You are –

4 DEFENDANT D. MALLETT: Guilty. Both defendants are guilty.

5 THE COURT: You're disrupting the proceeding. Remove him
6 from the proceeding.

7 DEFENDANT D. MALLETT: They taking the shackles off right
8 now.

9 THE COURT: The jury is in recess.

10 DEFENDANT D. MALLETT: Both defendants are guilty.
11 Terrance Mallett is guilty. Fuck all you white –

12 THE COURT: Jury may leave the courtroom for ten minutes.

13 DEFENDANT D. MALLETT: The black lady going to die. All
14 you mother fuckers are going to die. White son-of-a-bitch. Old
15 pieces of shit. Fuck white people. Fuck all the females.

16 THE COURT: The jury is instructed to disregard what the
17 defendant states.

18 DEFENDANT D. MALLETT: Kill all your mother fucking
19 grandkids. Don't put your press on me, homey. Fuck your kids.
20 Fuck your grandkids. Fuck your grandkids. Fuck your mother
21 fucking family. I'm going to kill all you mother fuckers. Fuck you
22 too, Burrell. Fucking bitch. I'm cool. I'm cool. Don't put
23 pressure on me. I'm serious, man, don't put no pressure. I said
24 I'm cool. Don't put no pressure.

25 THE COURT: Let the record reflect the jury has exited the
26 courtroom. You are excluded from this courtroom.

Let the record reflect that the defendant, Dawane Mallett, has been
taken from the courtroom.

I'd like counsel to assist the Court with communication to the jury
when the jury returns.

RT at 694:16-696:1. Following his removal from the courtroom, the U.S. Marshal advised the
court that movant would be in the cell with the audio and video feed "in an hour or so." Id. at
699:12-17. When the jury returned to the court room, the court instructed them not to consider

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1 anything they had heard movant say, inquired whether they could follow that instruction, and
2 received no indication from any juror that they could not. Id. at 710:13-24.

3 The United States Supreme Court has held that “a defendant can lose his right to
4 be present at trial if, after he has been warned by the judge that he will be removed if he
5 continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so
6 disorderly, disruptive, and disrespectful of the courtroom that his trial cannot be carried on with
7 him in the courtroom.” Illinois v. Allen, 397 U.S. 337, 343 (1970). Movant’s constitutional
8 rights were not violated by his removal from the courtroom.

9 Following movant’s outburst, his counsel joined in a motion for mistrial made by
10 movant’s co-defendant. RT at 702:21-25. The court found that movant’s outburst appeared “to
11 be a calculated attempt to disrupt th[e] trial and to create some type of an error” and denied the
12 motion. RT:704:8-705:17. Where, as here, movant’s own misconduct gave rise to the problem
13 and the court took reasonable steps to insure the jurors could serve impartially there is no error in
14 denying a motion for mistrial. See U.S. v. McCormac, 309 F.3d 623, 626-27 (9th Cir. 2002).
15 Movant’s appellate attorney was not ineffective for failing to raise this claim on direct appeal,
16 and movant has established neither cause nor prejudice for the procedural default of this claim.

17 4. Claim Nine

18 In his ninth ground for relief, movant alleges that during a period that he was
19 representing himself the Sacramento County Sheriff refused to allow movant to question his co-
20 defendant, refused to allow him to make “legal calls”, refused to give him five hours a week of
21 law library privileges, and the law library clerk failed to file movant’s motions on time or to
22 allow movant to do so through the law library. In its opposition to movant’s motion, respondent
23 suggests that some of these events occurred before the jail received a copy of the court’s order
24 allowing movant to represent himself, while movant’s complaints about difficulties in filing
25 motions were cured by his stand-by counsel. See Government’s Opposition to Mallett’s Petition
26 Pursuant to 28 U.S.C. § 2255, filed July 17, 2009, at 36-37. Movant has failed to establish any

1 constitutional violation concerning his ability to access the courts during his period of self-
2 representation. For that reason, this court finds that his appellate attorney was not ineffective in
3 failing to raise such a challenge on direct appeal and, therefore, that movant has failed to show
4 cause and prejudice sufficient to cure the procedural default of this claim.

5 5. Claim Eleven

6 In his eleventh claim, movant alleges that the trial court erred in denying his
7 motion to sever his case from that of his co-defendant so that he could testify on behalf of his co-
8 defendant without incriminating himself.⁵ Even assuming arguendo that movant could assert the
9 rights of his co-defendant to movant's testimony, movant has made no showing that he would
10 have provided testimony favorable to his co-defendant. See, e.g., U.S. v. Reese, 2 F.3d 870, 892
11 (9th Cir. 1993). Movant's appellate attorney was not ineffective for failing to raise this claim on
12 direct appeal, and movant has established neither cause nor prejudice for the procedural default
13 of this claim.

14 For all of the foregoing reasons, movant's § 2255 motion should be denied.
15 Pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings for the United States
16 District Courts, "[t]he district court must issue or a deny a certificate of appealability when it
17 enters a final order adverse to the applicant." Rule 11, 28 U.S.C. foll. § 2255. A certificate of
18 appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial
19 showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The court must either
20 issue a certificate of appealability indicating which issues satisfy the required showing or must
21 state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b). For the reasons
22

23 ⁵ Movant also alleges that the "court erred by erroneously denying all of defendant's
24 motions without "legal standing's" and failed to rule on a motion for bail before proceeding to
25 trial. Respondent suggests that movant's first contention may be that the court lacked
26 jurisdiction over his pretrial motions, a contention that is plainly without merit. The record
reflects that movant's motion for release on his own recognizance was denied by a magistrate
judge, see Minutes of Arraignment, August 7, 2003, and movant did not renew this motion
before the trial court.

1 set forth in these findings and recommendations, movant has not made a substantial showing of
2 the denial of a constitutional right. Accordingly, no certificate of appealability should issue.

3 For all of the foregoing reasons, IT IS HEREBY RECOMMENDED that:

4 1. Movant's April 3, 2008 motion to vacate, set aside, or correct his sentence
5 pursuant to 28 U.S.C. § 2255 be denied;

6 2. The district court decline to issue a certificate of appealability; and

7 3. The clerk of the court be directed to close the companion civil case No. 2:08-
8 cv-0707 GEB JFM.

9 These findings and recommendations are submitted to the United States District
10 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
11 days after being served with these findings and recommendations, any party may file written
12 objections with the court and serve a copy on all parties. Such a document should be captioned
13 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
14 objections shall be filed and served within fourteen days after service of the objections. The
15 parties are advised that failure to file objections within the specified time waives the right to
16 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

17 DATED: February 3, 2011.

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UNITED STATES MAGISTRATE JUDGE

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